92-1781

Supreme Court, U.S.
FILED
MAY 6 - 1993
OFFICE OF THE CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

FRANKLIN L. CASEY
and LINDA D. CASEY,

Petitioners

versus

NCNB TEXAS NATIONAL BANK, N.A., now known as NATIONSBANK OF TEXAS, N.A., and FEDERAL DEPOSIT INSURANCE CORPORATION, Receiver for First RepublicBank - Park Cities, N.A.

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I

QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court commit error in its application of the doctrine of D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942) and 12 U.S.C. §1823(e) by allowing consideration of alleged side agreements not signed by all parties to supplement promissory notes which were facially illegal?

2. Did the District Court commit error in granting summary judgment and then refusing to reconsider its summary judgment with respect to issues based upon facts occurring **after** expiration of the pleadings deadlines, the discovery deadlines, and the briefing deadlines for submission of the motion for summary judgment?

3. Did the District Court commit error in denying, without an evidentiary hearing, a motion to amend the record on appeal seeking to strike purported

"stipulations" by counsel based upon a facsimile signature, where there were material conflicts in the affidavits submitted?

LIST OF ALL PARTIES TO PROCEEDING

Pursuant to Rule 14.1(b) of the Rules of the Supreme Court, counsel for petitioner certifies that the following is a list of all parties to the proceeding below, including their counsel:

Franklin L. Casey, M.D.
Plaintiff below and Petitioner herein

Linda D. Casey
Plaintiff below and Petitioner herein

Lippe & Associates, P.C.
Emil Lippe, Jr.
Robert B. Buchan
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Attorneys for Franklin L. Casey and Linda D. Casey

NCNB Texas National Bank, N.A. (now known as NationsBank of Texas, N.A.)
Defendant below and Respondent herein

Federal Deposit Insurance Corporation, Receiver for First RepublicBank Park - Cities, N.A.
Intervenor below and Respondent herein

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Lindy D. Jones
Lynn G. Warren
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Kathleen W. Foster
Attorneys for Federal Deposit Insurance Corporation, Receiver of First RepublicBank - Park Cities, N.A.

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NO.

IN THE
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OCTOBER TERM, 1992

FRANKLIN L. CASEY
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NCNB TEXAS NATIONAL BANK, N.A., now known as NATIONSBANK OF TEXAS, N.A., and FEDERAL DEPOSIT INSURANCE CORPORATION, Receiver for First RepublicBank - Park Cities, N.A.

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, Franklin L. Casey and Linda D. Casey (hereafter "petitioners" or "the Caseys"), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of

Appeals for the Fifth Circuit, entered on February 5, 1993.

REFERENCE TO OPINIONS BELOW

The opinion of the District Court granting summary judgment in this case is not published, and is found at page 14a of the appendix. The District Court's order denying leave to amend the record is found at page 3a of the appendix. The opinion of the United States Court of Appeals for the Fifth Circuit is likewise not published and is included at page 1a of the appendix included herewith.

STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit Court of Appeals of which petitioners are requesting review was entered February 5, 1993. No motion for rehearing was filed and no extension of time has been requested within which to file this Petition for Writ of Certiorari.

This proceeding was initially filed

in Texas state court by petitioners, and was removed to Federal Court pursuant to 12 U.S.C. §1819 when the FDIC intervened.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED IN THE CASE

The first issue presented for review involves consideration of the Federal Common Law Doctrine announced by this Court in D'Oench, Duhme, and its statutory progeny, 12 U.S.C. §1823(e) (Appendix {hereafter "App."} at 42a).

The second issue presented for review requires interpretation of the summary judgment rule, Rule 56, F.R.Civ.P. (App. at 34a), and Rule 60, F.R.Civ.P. (App. at 39a).

The third issue presented for review involves issues relating to the interplay between Rule 10(e), F.R.App.P. (App. at 32a), and Rule 43(e), F.R.Civ.P (App. at

34a).

STATEMENT OF THE CASE

Nature of the Case

This suit was originally filed in Texas state court by petitioners, seeking an injunction against foreclosure by NCNB Texas National Bank, N.A., now known as NationsBank of Texas, N.A. (hereafter "NCNB") on certain real property securing five promissory notes, and seeking damages and other relief due to usury and other illegal acts. NCNB counterclaimed on the notes. The FDIC, in its capacity as Receiver for First RepublicBank - Park Cities, N.A. (hereafter "FDIC") subsequently intervened and removed this case to the United States District Court, Northern District of Texas, pursuant to 12 U.S.C. §1819. Summary judgment was granted by the District Court, from which an appeal was perfected to the United States Court of Appeals for the Fifth

Circuit, which affirmed the District Court decision. During the pendency of the appeal, petitioners moved to amend the record on appeal pursuant to Rule 10(e), F.R.Civ.P., which motion was denied without an evidentiary hearing.

Course of Proceedings and Disposition in Court Below

This appeal arises from the granting of motions for summary judgment filed by NCNB and FDIC, dismissing all the petitioners' claims for relief and awarding NCNB judgment on the promissory notes in question, and the denial of petitioners' original and amended motions for reconsideration, and their motion to reopen evidence and alternative motion for new trial, pursuant to Rules 56, 59 and 60, Fed.R.Civ.P.

Petitioners' third amended complaint ("amended complaint"), filed March 18, 1991, concerned five promissory notes

secured by deeds of trust on certain real estate owned by the Caseys. The amended complaint alleged violations of Article 5069 of the Texas Revised Civil Statutes relating to usury and creation of illegal liens on real property, and certain other violations of Federal and Texas law.

On February 21, 1991, a scheduling order was entered establishing a pleadings deadline of June 24, 1991, and a discovery cut-off date of July 29, 1991. (R. 257-259). A motion to extend the deadlines in the scheduling order was filed by petitioners on July 23, 1991 (R. 445),[1] which was never granted. The District Court denied petitioners' request to amend their pleadings further by filing a fourth amended complaint. (R. 484). Petitioners filed a second motion for continuance on

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[1] References to the Record on Appeal are included herein for the Court's information in the event that this petition is granted.

August 23, 1991 (R. 642, 660), which was denied. (R. 664, 666).

NCNB and the FDIC filed motions for summary judgment on July 18, 1991. On August 6, 1991, petitioners filed their responsive materials. (R. 505). Under the Local Rules for the Northern District of Texas, the FDIC and NCNB were allowed to file reply briefs on August 19, 1991. (R. 520, 534). Under the local rules, this concluded the briefing on the pending motions.

After the discovery and pleadings deadlines had expired, and after the motions for summary judgment had been briefed and were under submission, respondent NCNB conducted foreclosures on September 3, 1991 and on October 1, 1991, on all the properties belonging to petitioners which secured the notes in question. On November 15, 1991, the District Court entered an interlocutory

order granting the motions for summary judgment. (App. 14a) On November 29, 1991, present counsel was substituted in as counsel of record for the Caseys. (R. 743).

Thereafter, in December 1991, pursuant to Rules 56, 59, and 60, petitioners filed original and amended motions for reconsideration of the summary judgment order (R. 745) and a motion to reopen evidence and alternative motion for new trial (R. 881). These motions advised the District Court of the foreclosures which had recently occurred, and asked that the summary judgment be reconsidered, and that the court credit the fair market value of the foreclosed properties prior to entering judgment, as required by § 51.003 of the Texas Property Code. (App. 44a). These motions were supported by affidavits, which established that the judgment proposed by NCNB did not allow

credit for the "fair market value" of the foreclosed properties as required by Texas Law. (R. 788-789). On March 4, 1992, the District Court denied petitioners' motions and instructed counsel for NCNB to submit a proposed judgment (App. 12a), resulting in the judgment signed March 18, 1992 (App. 7a).

When NCNB submitted its proposed judgment, petitioners objected, and filed an affidavit attaching a Form 1099, which petitioners had received from the FDIC after January, 1992. This Form 1099 contained information which, for the first time, revealed the "appraised values" of the foreclosed properties according to the appraisals by NCNB/FDIC. (R. 1001-1004). Although a credit of these "appraised values" would have left a deficiency balance of $143,140.13 on the five promissory notes, the District Court nevertheless entered judgment based upon

the actual foreclosure price, resulting in a judgment of $357,903.47. (R. 1006). Moreover, the District Court's judgment ignored petitioners' valuation evidence which would have resulted in a deficiency balance of $39,140.13.

STATEMENT OF FACTS

This lawsuit concerns five promissory notes signed in 1984, secured by deeds of trust on the five real estate properties in Dallas County, Texas. InterFirst Bank - Park Cities made the loans, which were transferred eventually to a post-FDIC receivership bridge bank which became NCNB in July 1988. Two of the notes were variable rate notes, and the three remaining notes (hereafter referred to as "the duplex notes") were monthly installment loans with no stated interest rates.

Although the District Court found there was an agreement by the Caseys to

pay 14% interest on the duplex notes (App. 25-26), the court had to rely upon deposition testimony and upon disclosure statements allegedly sent contemporaneously by the bank. Petitioners disputed such findings, and there was evidence before the District Court contradicting such alleged agreement to pay 14% interest. (R. 875, 877, 879).

After petitioners' appeal to the Fifth Circuit was perfected, the respondents' briefs filed in the Fifth Circuit established that respondents NCNB and FDIC were relying heavily upon alleged "stipulations of fact" contained in the joint pretrial order which had been submitted to the District Court. Accordingly, prior to the time that petitioners filed their reply brief with the Fifth Circuit, they filed a motion in the District Court to amend the record pursuant to Rule 10(e), F.R.App.P., on

September 29, 1992, specifically requesting an evidentiary hearing.

The joint pretrial order which was submitted to the District Court had original signatures of counsel for NCNB, but only a purported facsimile signature of Lloyd Ward, counsel for petitioners. (R.X. at 50).[2] Examination of the signature page bearing Mr. Ward's purported signature makes it clear that it was a separate page which was added to the pretrial order when it was submitted to the District Court.[3]

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[2] Present counsel for Caseys was not counsel at the time of the submission of the joint pretrial order. Mr. Ward was, at the time in question, an associate attorney employed by Friedman & Associates, a law firm in Dallas, Texas.

[3] Various state and federal courts have wrestled with the propriety of acceptance of facsimile signatures on pleadings. Counsel for petitioners is aware of no uniformity whatsoever in practice with regard to such documents, except that, to counsel's knowledge, it is the practice of most costs (including the Northern District of Texas) to refuse

The motion to amend record was supported by the affidavit of Linda Casey, one of the petitioners herein, establishing that she neither saw nor approved of the purported stipulations of fact, and never authorized such stipulations. The affidavit of Lloyd Ward established that he neither saw nor agreed to the purported "stipulated facts", but instead that he thought he was only agreeing to submission of various witness lists, exhibit lists, contested issues, and proposed findings of fact and conclusions of law.

In response to the motion to amend record, respondents NCNB and FDIC filed affidavits of counsel vigorously disputing the material facts set forth in the Ward affidavit, claiming instead that Mr. Ward had in fact seen and agreed to the

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documents based upon a facsimile or photocopy signature.

purported "stipulations." Despite these obvious disputes over material facts critical to determination of the motion to amend record, the District Court denied the motion without an evidentiary hearing. (App. at 3a).

ARGUMENT

I.

THE SUMMARY JUDGMENT WAS BASED UPON ALLEGED ORAL AGREEMENTS AND UNSIGNED "SIDE AGREEMENTS".

The District Court held that petitioners' claims were based upon "oral representations of InterFirst Bank - Park Cities and First RepublicBank" (App. 717), apparently concluding that this was a violation of D'Oench, Duhme, and 12 U.S.C. § 1823(e).

This ruling misconstrued the very nature of petitioners' claims. The charging of a usurious interest rate in violation of Article 5069 - 1.06, Tex.Rev.Civ.Stat., appears facially on the

bank's instruments.[4] Proof of an agreement to the contrary concerning interest rates would be based upon the bank's oral testimony, which is not allowed under 12 U.S.C. §1823(e).

The question of whether an agreement to pay interest was reached by the parties is generally a question of fact. Preston Farm & Ranch Supply v. Biozyme Ent., 625 S.W. 2d 295, 298 (Tex. 1982). An instrument containing amortization information sent to the debtor after contract formation does not constitute a contract as to interest rates where the

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[4] Where there is no agreement on a specific rate of interest, the statutory rate of six percent (6%) is read into the agreement and it is the maximum rate of interest allowed on the transaction. Triton Oil & Gas Corp. v. Marine Contractors, 644 S.W.2d 443, 445 (Tex. 1982); Houston Sash & Door Co. v. Heaner, 557 S.W.2d 217, 221 (Tex. 1979). A party charging more than 6% interest under such circumstances is subject to statutory penalties for illegal usury as contained in Article 5069-1.06. Id.

loan agreement, which included monthly payments, was completed several weeks before. Baker v. Howard, 799 S.W.2d 450, 452 (Tex.App. - Waco 1990, no writ). Every note, negotiable or non-negotiable, must be a contract before it can qualify as a note. The writing must contain the essential elements of a contract. FDIC v. Eagle Properties, Ltd., 664 F.Supp. 1027, 1034 (W.D. Tex. 1985).

Even if the interest in the duplex notes passed to the FDIC as receiver, D'Oench, Duhme and 12 U.S.C. § 1823(e) are simply inapplicable to avoid defects which appear facially from the very notes upon which respondents rely.

Petitioners have never contended that there was a collateral or "secret agreement" to charge illegal interest rates. It is NCNB which is attempting to enforce a collateral document, which was not signed by the borrowers, in order to

enforce a 14% interest rate, namely, the disclosure statements. See, 12 U.S.C. § 1823(e). Thus, if anyone's claims would be barred under D'Oench, Duhme, it would be NCNB's, and not the Caseys'.

In order for respondents to invoke D'Oench, Duhme or § 1823(e), they must establish the existence of a side agreement not contained in the instruments sought to be enforced. FDIC v. Bracero and Rivera, Inc., 895 F.2d 824, 829-830 (1st Cir. 1990). The statute only applies to an agreement separate and collateral from the instruments which the FDIC is seeking to enforce. Commercial Federal Sav. Bank v. FDIC, 872 F.2d 1240, 1244-1245 (6th Cir. 1989).

This purpose of § 1823(e) is to protect the FDIC from hidden agreements that would defeat its interest in a facially valid note. Id. at p. 1245, citing, Federal Deposit Ins. Corp. v.

Hatmaker, 756 F.2d 34, 37 (6th Cir. 1985); FDIC v. O'Neill, 809 F.2d 350, 354 (7th Cir. 1987). Since the duplex notes acquired by the FDIC are facially invalid, petitioners have not asserted any claims which diminish the "right or interest" acquired by the FDIC. This Court previously recognized that a void instrument operates to completely vitiate D'Oench, Duhme and its statutory progeny, 12 U.S.C. § 1823(e), since there is no right, title or interest to be diminished or defeated. Langley v. Federal Deposit Ins. Corp., 484 U.S. 86, 93-94 (1987).

The Fifth Circuit has held that D'Oench, Duhme may not be invoked to avoid a subordination agreement which had limited the bank's rights from the outset, even though the agreement was never in the bank's files. FDIC v. RepublicBank Lubbock, N.A., Lubbock, Tex., 883 F.2d 427, 429 (5th Cir. 1989). It has also

recognized that D'Oench, Duhme does not of itself thwart the assertion of rights for relief from wrongful acceleration and unreasonable sale at foreclosure nor does § 1823(e) prevent a plaintiff from asserting claims that do not depend on an oral agreement. Texas Refrigeration Supply v. FDIC, 953 F.2d 975, 981 (5th Cir. 1992).

The FDIC and NCNB cannot rely on oral side agreements any more than private parties. Allied Elevator, Inc. v. East Texas State Bank, 965 F.2d 34, 38 (5th Cir. 1992). In FDIC v. Panelfab Puerto Rico, Inc., 739 F.2d 26, 30 (1st Cir. 1984), the First Circuit essentially held that §1823(e) could not be used offensively. The court there held that the FDIC cannot, on one hand, enforce a guarantee or debt agreement as valid for collection purposes, and on the other hand, assert that certain provisions

contained therein are unenforceable. Id. at 30. Here, respondents are attempting to treat the duplex notes as completely valid with regard to all their terms, except to the extent they fail to provide for interest rates. The FDIC cannot assume inconsistent positions with regard to interest rates in the same litigation. Id.; see also, FSLIC v. T.F. Stone - Liberty Land, 787 S.W.2d 475, 493 (Tex.App. - Dallas 1990).

The extensions of D'Oench, Duhme by the lower courts have reached ridiculous extremes. The examples of courts frankly admitting the injustice of the rule while simultaneously extending it further are legion. See, e.g., Resolution Trust Corp. v. McCrory, 951 F.2d 68, 72 (5th Cir. 1992); Bowen v. FDIC, 915 F.2d 1013, 1016 (5th Cir. 1990); FDIC v. McClanahan, 795 F.2d 512, 516-517 (5th Cir. 1986); Texas Refrigeration Supply v. FDIC, 953 F.2d

975, 979-980 (5th Cir. 1992). At a bare minimum, this Court should at least direct the lower courts to apply the estoppel principles underlying the rule uniformly to both the FDIC and to private parties.

II.

THE SUMMARY JUDGMENT RULING SHOULD HAVE BEEN RECONSIDERED DUE TO SUBSEQUENT EVENTS.

A.

The District Court improperly refused to continue the summary judgment hearing.

Rule 56(f), F.R.Civ.P., provides protection for a party who is unable to present facts necessary to defeat a motion for summary judgment. 10A Federal Practice and Procedure, Wright Miller & Kane, § 2740 p. 530. It is critical to note the underlying purpose of Rule 56(f) and the manner in which it has been construed:

> The purpose of subdivision (f) is to provide an additional safeguard against an improvident or premature grant of summary

> judgment, and the rule generally has been applied to achieve that objective. Consistent with this purpose, courts have stated that technical rulings have no place under the subdivision and that it should be applied with a spirit of liberality.

Id., p. 532. (Emphasis added). This purpose of allowing adequate time for discovery has been recognized by this Court as essential. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

Here, present counsel for the Caseys filed a proper Rule 56(f) affidavit, establishing that the Caseys sought to prove that as of November 30, 1991, NCNB no longer was the owner and holder of the notes in question (R.IV.828). It was impossible to present such an affidavit prior to the District Court's memorandum order, because the transfer took place afterward. It is undeniable that the affidavit was in proper form, and that the element which it attacked was crucial to

NCNB's case. As a result, the District Court granted a judgment on notes for an entity which was not the owner and holder. Summary judgment is improper where there is doubt as to who is the owner and holder of the note. FDIC v. McCrary, 977 F.2d 192, 195 (5th Cir. 1992).

In addition, two motions for continuance were filed by the Caseys' former counsel while the motions for summary judgment were pending (R. 445, 642). Despite respondents' objections that these motions did not meet the technical requirements of Rule 56(f), it has long been the law that hypertechnical application of the requirements of Rule 56(f) is improper. Whitaker v. Coleman, 115 F.2d 305, 307 (5th Cir. 1940); Buchanan v. Stanships, Inc., 744 F.2d 1070, 1074 (5th Cir. 1984).

Present counsel for petitioners readily concedes that the two motions for

continuance filed by former counsel did not recite all the technical elements of Rule 56(f), and that one motion was not verified (R. 445, 662). Consistent with the liberal construction of Rule 56(f), the Courts of Appeal have excused non-specificity, Habib v. Raytheon Co., 616 F.2d 1204, 1210 (D.C. Cir. 1980), and even a failure to file an affidavit at all. First Chicago International v. United Exchange Co., Ltd., 836 F.2d 1375, 1381 (D.C.Cir. 1988).

Here, in the first motion for continuance, filed July 23, 1991, petitioners' counsel advised the District Court in general terms that new discovery had to be evaluated, and additional depositions might be needed. (R. 445-446). In the second motion for continuance, filed August 23, 1991, petitioners' counsel informed the District Court of the following, among other

things:

1. NCNB had conducted an appraisal of the real property securing the loans two weeks after the discovery completion deadline and over thirty days after the deadline for amending pleadings. The Caseys sought discovery of such appraisals. (R. 643, 646).

2. The Caseys sought depositions of the FDIC concerning transfer of the loans and loan documents at issue. (R. 643).

3. Due to the actions of NCNB after the discovery and pleadings deadlines, the Caseys stated that it would be necessary to designate additional witnesses and experts concerning valuation of real property and the proper procedure for appraising real property. (R. 647).

4. NCNB had delayed producing documents, and additional time was necessary to examine documents produced and designate additional experts who had reviewed such documents. (R. 646-647).

Although such second motion was not verified, it was clearly subject to Rule 11, F.R.Civ.P., giving the District Court virtually the same power for assessing sanctions as Rule 56(g), F.R.Civ.P. The

motion for continuance was denied. (R. 664).

Under the record, it was a clear abuse of discretion for the District Court to refuse a continuance. International Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257, 1266-1268 (5th Cir. 1991); see also, Cowan v. J.C. Penney Co., Inc., 790 F.2d 1529, 1532 (11th Cir. 1986).

B.

The evidence should have been reopened to consider subsequent events.

The judgment entered by the District Court failed to credit the fair market value of the properties as established by petitioners' evidence and NCNB's own appraisals as shown by the Form 1099 sent to the Caseys by the FDIC, which was received after the District Court's initial ruling in November, 1991.

Presumably, had the District Court granted the motion for continuance filed

by petitioners before summary judgment was granted, petitioners would have obtained discovery of these appraisals.

Proper cause existed for consideration of the affidavits submitted by petitioners because the foreclosures and the sending of the Form 1099 occurred after the deadline for submission of summary judgment briefing by all parties in August 1991 and after all pleadings and discovery deadlines had expired. The District Court should have reopened the evidence and considered the opinions of experts where their opinion was shown to have a proper foundation and to be reliable. Compare, Washington v. Armstrong World Industries, Inc., 839 F.2d 1121, 1123 (5th Cir. 1988). It has been held that a party may reopen the record in a non-jury case on the issue of damages where the findings and conclusions with respect to liability have been filed, but

determination on the question of damages has not yet been rendered. Schoenholtz v. Doniger, 112 F.R.D. 110 (S.D.N.Y. 1986).

Petitioners' motion was timely filed because it was filed within the one year limitation period under Rule 60.

It has been held that where a judgment exceeds the proper amount, and there is no basis in fact for the judgment, it should be set aside under Rule 60(b)(6). Compton v. Alton Steamship Co., Inc., 608 F.2d 96, 107 (4th Cir. 1979). The fact that a motion for reconsideration relates to an order granting summary judgment does not relieve the District Court of its responsibility to hear the motion. Sidney-Vinstein v. A.H. Robins Co., 697 F.2d 880, 885 (9th Cir. 1983).

A new trial should be granted where the amount awarded is excessive or contrary to the weight of evidence, or has

resulted in a miscarriage of justice. Pinner v. Schmidt, 805 F.2d 1258, 1262 (5th Cir. 1986), cert. den'd., 483 U.S.1022. A fundamental consideration is whether the trial was fair, Davis v. FMC Corp., 771 F.2d 224, 233 (7th Cir. 1985). Even when there is substantial evidence supporting a verdict, there may have been a miscarriage of justice warranting a new trial. Leichihman v. Pickwick Intern., 814 F.2d 1263, 1267 (8th Cir. 1987), cert. den'd., 484 U.S. 855.

The entry of the judgment here created a miscarriage of justice with regard to the Caseys, because a judgment was entered in an amount far higher than if proper credit had been allowed for fair market value of the properties, and even higher than if NCNB's own appraisal values were utilized.

In reaching a decision to grant or deny a new trial on the basis of newly

discovered evidence, the District Court must consider whether the evidence is (1) merely cumulative or impeaching, (2) whether it is material, (3) whether the moving party used due diligence to discover the evidence at the time of trial, and (4) whether the new facts would probably change the outcome. Johnston v. Lucas, 786 F.2d 1254, 1257 (5th Cir. 1986); Johnson Waste Materials v. Marshall, 611 F.2d 593 (5th Cir. 1980). Newly discovered evidence relating to damages can warrant a new trial under Rule 60(b)(2). Chilson v. Metropolitan Transit Authorities, 796 F.2d 69, 70 (5th Cir. 1986).

Where there is evidence of prior payment of a portion of an obligation from which a judgment arose, mere negligence by a party does not preclude relief under Rule 60(b). Johnson Waste Material v. Marshall, 611 F.2d at 597. Where payment

can be conclusively shown a judgment should be set aside to prevent a manifest miscarriage of justice. Id. at 599.

In the context of Rule 56, summary judgment should not be granted unless the non-moving party has had the opportunity to discover information essential to the summary judgment opposition. Celotex v. Catrett, 477 U.S. 317, 322 (1986); Moreau v. Klevenhagen, 955 F. 2d 516, 523 (5th Cir. 1992); Elvis Presley Enterprises, Inc. v. Elvisly Yours, Inc., 936 F.2d 889, 893 (6th Cir. 1991); Grove v. Meade School Dist. No. 354, 753 F.2d 1528 (D.C. Cir. 1985); cert. den'd, 474 U.S. 826.

III.

THE "STIPULATIONS" SHOULD HAVE BEEN STRICKEN FROM THE RECORD

Respondents relied heavily in the Fifth Circuit upon certain purported "stipulations" contained in the Joint Pretrial Order (R.X. at 7, 8-18) which

were allegedly agreed to by prior counsel for the Caseys. Upon review of the original record, petitioners and their present counsel were shocked to learn that such "stipulations" had allegedly been made, which were contrary to their arguments presented to the District Court, and contrary to the facts. Accordingly, petitioners filed a Motion to Amend Record pursuant to F.R. App. P. 10(e) on September 29, 1992 with the District Court, requesting an evidentiary hearing before the District Court. The motion was summarily denied without a hearing. (App. at 3a).

Neither petitioners nor their counsel of record ever authorized or agreed to such purported "stipulated facts", as established by the affidavits of Linda Casey and Lloyd Ward (the attorney whose purported signature is annexed to the Pretrial Order). (Casey Suppl. R.E. at

Tab 3, Ex. 2 at pp. 2-3; and Ex. 3 at pp. 2-3).

Although counsel for NCNB disputed Mr. Ward's testimony, and claimed that he had seen a draft of the pretrial order containing the "stipulations," no proof of mailing, hand delivery, or facsimile transmission of the draft to Mr. Ward was ever offered to the District Court, and Ward flatly denied having received the draft (Casey Suppl. R.E. at Tab 4).

Although admittedly under Rule 43(e), F.R. Civ. P., a District Court may consider motions on the basis of affidavits alone, where there is a direct conflict in the affidavits on a material issue, the better practice is to hold an evidentiary hearing. Federal Sav. & Loan Ins. Corp. v. Dixon, 835 F.2d 554, 558 (5th Cir. 1987); Commerce Park at DFW Freeport v. Mardian Const. Co., 729 F.2d 334, 340-341 (5th Cir. 1984). Here, the

District Court summarily denied the motion to amend without an evidentiary hearing, despite a specific request for such a hearing.

Petitioners respectfully urge this Court to give guidance to the lower courts in applying Rule 43(e), F.R.Civ.P., so that they do not try critical fact issues by affidavits, but instead hold hearings where there are material fact disputes. The injustice of what can result is shown by the facts of this case: petitioners were denied a jury trial on their claims against NCNB based in large part upon purported "stipulations" never authorized by the clients, where the "agreement" to such "stipulations" is denied by their counsel, and evidenced only by a facsimile signature and the self-serving affidavits of opposing counsel -- yet, when petitioners challenged such "stipulations", they were denied an

evidentiary hearing.

The law is clear that where there is doubt concerning a purported admission, the matter may not be deemed conclusive, Wilder v. Towmoter Corp., 568 F.Supp 1058, 1063 (E.D.Pa. 1983), aff'd., 734 F.2d 9(3d Cir. 1984). For a stipulation to be binding, it must have been deliberately made. Humble Oil & Refining Co. v. Sun Oil, 191 F.2d 705, 714 (5th Cir. 1951), cert. den., 342 U.S. 920 (1952). Where "manifest injustice" would be inflicted by rigid adherence to an evidentiary stipulation, the stipulation should be modified. Central Distributory, Inc. v. M.E.T., Inc., 403 F.2d 943, 945-949 (5th Cir. 1968). The Texas courts have recognized that stipulations made by counsel can be set aside upon a showing of fraud, accident, or mistake. Republic Ins. Co. v. O'Donnell Motor Co., 289 S.W. 1064, 1065 - 66 (Tex. Civ. App. - Dallas

1926, no writ).

The purported "stipulations" go to the very heart of the Caseys' claims, and to their opposition to the motions for summary judgment, and involve hotly contested issues. It is utterly inconceivable that the Caseys would have filed this suit, pursued discovery, and vigorously opposed the motions for summary judgment, all at great expense, and then stipulate to facts which essentially admitted away the factual bases for most of their claims. It is apparent that Mr. Ward's facsimile signature was affixed to a document containing self-serving, one-sided "stipulations" of fact which he had never seen or authorized.

It has held that:

> What in fact went on below may be settled and placed of record pursuant to Rule 10(e), and whatever proceedings are necessary to that end are permissible.

United States v. Page, 661 F.2d 1080, 1082 (5th Cir. 1981), cert. den., 455 U.S. 1018. If counsel have exceeded their authority in agreeing to an order, the proper remedy is to apply first to the District Court to modify or set aside the order. Hunt v. Bankers Trust Co., 799 F.2d 1060, 1068 - 69 (5th Cir. 1986).

Even if the Caseys' former counsel had agreed to them, such "stipulations" were without authority. An attorney's authority to stipulate is governed by Texas law. United States v. State of Texas, 523 F.Supp 703, 712 n.2(E.D. Tex. 1981). Generally, under Texas law, while an attorney may have authority to narrow facts in dispute, he is not authorized to agree to surrender his client's claim altogether. Id. at 713, n.2. As the Texas courts have held,

> But the compromise or the dismissal of a cause by an attorney without his client's

> knowledge or consent, which has the effect of depriving the client of his day in court, is an entirely different matter. It is a deliberate betrayal, by means of an unauthorized act, of the litigant by his attorney. Not only is it a betrayal of the client, it is a fraud upon the court as well.

Pierce v. Terra Mar Consultants, Inc., 566 S.W.2d 49, 52-53(Tex. Civ. App. - Texarkana 1978, writ dism'd.).

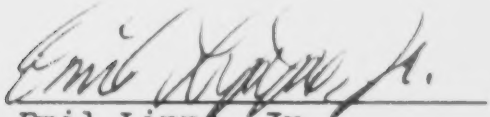
Similarly, it has been noted that an attorney has "no general or implied authority to ... stipulate in such manner as to surrender substantial rights." Whitebird v. Eagle - Picher Co., 258 F.Supp. 308, 311 (N.D. Okla. 1966). (Emphasis added). Respondents' arguments based upon the purported "stipulations" have made it clear beyond dispute that they at least believe that the "stipulated facts" in the Pretrial Order constituted a "surrender" or loss of "substantial rights" by the Caseys. Since specific

authority to enter into such devastating "stipulations" was never granted by petitioners, they should have been set aside.

CONCLUSION

For the reasons stated above, petitioners Franklin L. Casey and Linda D. Casey respectfully pray that the Honorable United States Supreme Court issue its writ of certiorari to the United States Court of Appeals for the Fifth Circuit, schedule this case for briefing and oral argument and, upon final consideration, reverse the judgments of the Fifth Circuit and the District Court, order the case remanded for a full trial, and award petitioners their costs and general relief.

Respectfully submitted,

By: 

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

FRANKLIN L. CASEY
and LINDA D. CASEY,

Petitioners

versus

NCNB TEXAS NATIONAL BANK, N.A., now known as NATIONSBANK OF TEXAS, N.A., and FEDERAL DEPOSIT INSURANCE CORPORATION, Receiver for First RepublicBank - Park Cities, N.A.

Respondents

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1379

FRANKLIN L. CASEY and
LINDA D. CASEY,

Plaintiffs-Counter
Defendants-Appellants,

v.

NCNB TEXAS NATIONAL BANK,

Defendant-Counter
Plaintiff-Appellee

and

FEDERAL DEPOSIT INSURANCE CORPORATION,
Receiver for First RepublicBank Park Cities, N.A.

Intervening Defendant-
Appellee

Appeal from the
United States District Court
for the Northern District of Texas
(CA3-91-0112-H)

Before REAVLEY, KING, and WIENER, Circuit Judges.

PER CURIAM:*

AFFIRMED. See Local Rule 47.6.

[Filed February 5, 1993]

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burden on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FRANKLIN L. CASEY and LINDA D. CASEY,	*	[File Date: OCT 22 1992]
Plaintiffs	*	
v.	*	Civil Action No.
NCNB TEXAS NATIONAL BANK,	*	3:91-CV-0112-H
Defendant,	*	
and	*	
FDIC, Receiver for First RepublicBank Park Cities, N.A.	*	

O R D E R

Before the Court are Plaintiffs' Motion to Amend Record and supporting brief, filed September 29, 1992; NCNB Texas National Bank's Reply [Response] in Opposition to Plaintiffs' Motion, filed October 8, 1992; FDIC-R's Response to Plaintiffs' Motion, filed October 13, 1992; Plaintiffs' Reply Brief in Support

of Motion, filed October 14, 1992; and Plaintiffs' Reply Brief to Response of FDIC-R, filed October 15, 1992.

Pursuant to Federal Rule of Appellate Procedure 10(e), Plaintiffs move the Court to amend the record of this case pending on appeal before the Fifth Circuit. Contending that Plaintiffs' counsel Lloyd Ward neither saw nor agreed to the Stipulated Facts in the Pretrial Order, filed November 5, 1991. Plaintiffs ask the Court to hold a hearing to determine whether the stipulated facts should be stricken from the record.

Defendants contest the factual basis of Plaintiffs' motion. Further, they oppose a hearing and argue that Rule 10(e) does not allow Plaintiffs' desired relief.

Rule 10(e) of the Federal Rules of Appellate Procedure sets out the circumstances and method for allowing correction or modification of the record

on appeal:

> If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, . . . the omission or misstatement [may] be corrected . . . .

Interpreting Rule 10(e) in 1974, the Fifth Circuit held that the rule "does not empower a district court to modify parties' stipulations or make new findings of fact after docketing of the appeal in the court of appeals." United States v. Smith, 493 F.2d 906, 907 (5th Cir. 1974) (footnote omitted). More recently, the Fifth Circuit approved the Smith court's view of Rule 10(e) to allow only a determination of "[w]hat in fact went on" in the proceedings of the district court, and not "what might have been done-but was not." United States v. Page, 661 F.2d

1080, 1082 (5th Cir. 1981) (emphasis in original), cert. denied, 455 U.S. 1018 (1982).

In this case, "what went on" is that a signed joint pretrial order containing stipulations of fact was filed November 5, 1991, and was relied on by the Court without objection from either party. Plaintiffs do not seek simply to modify the record as to the pretrial order; rather, they seek impermissibly to alter the substance of the pretrial order itself, thereby accomplishing on appeal "what might have been done but was not" in the district court. Id. Rule 10(e) does not permit such an undertaking.

Accordingly, Plaintiffs' motion is DENIED.

SO ORDERED.

DATED: October 22, 1992.

By: /s/ BAREFOOT SANDERS, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FRANKLIN L. CASEY and LINDA D. CASEY,	§	[File Date: MAR 18 1992]
Plaintiffs,	§	
v.	§	Civil Action No.
NCNB TEXAS NATIONAL BANK,	§	3:91-CV-0112-H
Defendant,	§	
and	§	
FEDERAL DEPOSIT INSURANCE CORPORATION, Receiver for First RepublicBank Park Cities, N.A.	§	
Intervenor.	§	

JUDGMENT

After considering Defendant/Counter-Plaintiff NCNB TEXAS NATIONAL BANK, now known as NATIONSBANK OF TEXAS, and Intervenor FEDERAL DEPOSIT INSURANCE CORPORATION, in its capacity as Receiver for FIRST REPUBLIC BANK DALLAS, PARK CITIES BRANCH BANK'S ("FDIC-R") Motions

for Summary Judgment in the above entitled and numbered cause, the Court examined the pleadings and the summary judgment evidence, and it appearing to the Court that NATIONSBANK OF TEXAS' and FDIC-R's Motions for Summary Judgment be granted, that NATIONSBANK OF TEXAS, formerly known as NCNB TEXAS NATIONAL BANK, is entitled to a summary judgment against the Plaintiffs/Counter-Defendants, FRANKLIN L. CASEY and LINDA D. CASEY, as prayed for, including attorneys' fees, and that FRANKLIN L. CASEY and LINDA D. CASEY be awarded a take nothing judgment on their claims against NCNB TEXAS NATIONAL BANK, now known as NATIONSBANK OF TEXAS, and FDIC-R;

IT IS THEREFORE ORDERED that FRANKLIN L. CASEY and LINDA D. CASEY take nothing on their claims against NATIONSBANK OF TEXAS, formerly known as NCNB TEXAS NATIONAL BANK, and FDIC-R, and that

NATIONSBANK OF TEXAS, formerly known as NCNB TEXAS NATIONAL BANK, and FDIC-R recover their respective costs of Court jointly and severally from FRANKLIN L. CASEY and LINDA D. CASEY, for which let execution issue.

IT IS FURTHER ORDERED that NATIONSBANK OF TEXAS, formerly known as NCNB TEXAS NATIONAL BANK, have and recover judgment from FRANKLIN L. CASEY and LINDA D. CASEY, jointly and severally, on the Promissory Notes in the combined principal sum of Three-Hundred-Fifty-Seven-Thousand-Nine-Hundred-Three Dollars and Forty-Seven Centers ($357,903.47), plus all accrued but unpaid pre-judgment interest on such amount at the rate provided in said Notes totallingTwenty-Two-Thousand-One-Hundred-One Dollars an Eighty-Three Cents ($22,101.83) through and including March 10, 1992, together with interest on the total sum of Three-Hundred-Eighty-

Thousand-Five Dollars and Thirty Cents ($380,005.30) at the rate of four and fifty-eight hudredths percent (4.58%) per annum from that date until paid, for all of which let execution issue.

IT IS FURTHER ORDERED that NATIONSBANK OF TEXAS, formerly known as NCNB TEXAS NATIONAL BANK, recover from FRANKLIN L. CASEY and LINDA D. CASEY, attorneys' fees and expenses in the total sum of Eight-Three-Thousand-Seven-Hundred-Five Dollars and Five Cents ($83,705.05), together with interest on such amount at the rate of four and fifty-eight hundredths percent (4.58%) per annum from the date of judgment until paid, and for all costs of Court herein, for all of which let execution issue.

IT IS FURTHER ORDERED that all relief requested by any party in their respective live pleadings on file in this case that is not specifically granted in this

Judgment is hereby DENIED.

SIGNED this 18th day of March, 1992.

By: /s/ BAREFOOT SANDERS, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FRANKLIN L. CASEY and LINDA D. CASEY,	*	[File Date: MAR 4 1992]
Plaintiffs	*	
v.	*	Civil Action No.
NCNB TEXAS NATIONAL BANK,	*	3:91-CV-0112-H
Defendant	*	
and	*	
FEDERAL DEPOSIT INSURANCE CORPORATION, Receiver for First RepublicBank Park Cities, N.A.	*	

O R D E R

Before the Court are: Plaintiffs' Amended Motion and Brief for Reconsideration of Summary Judgment Order, Motion to Reopen Evidence, and Alternative Motion and Brief for New Trial, filed December 13, 1992; Defendant NCNB's Response, filed January 6, 1992;

Intervenor FDIC's Response, filed January 6, 1992; and Plaintiffs' Reply, filed January 21, 1992.

The Court has fully reviewed Plaintiffs' various motions and is of the opinion that they should be and are hereby DENIED.

The Court notes that the property at issue in this suit has been foreclosed upon by Defendant NCNB. In light of these circumstances, Defendant NCNB and Intervenor FDIC are DIRECTED to prepare a new final judgment, reflecting the proper credit to be given the Plaintiffs for the net proceeds of the various foreclosures, by noon, March 11, 1992.

SO ORDERED.

DATED: March 4, 1992.

By: /s/ BAREFOOT SANDERS, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FRANKLIN L. CASEY and LINDA D. CASEY,	*	[Filed, Entered: NOV 15 1991]
Plaintiffs	*	
v.	*	Civil Action No.
NCNB TEXAS NATIONAL BANK,	*	3:91-CV-0112-H
Defendant	*	
and	*	
FEDERAL DEPOSIT INSURANCE CORPORATION, Receiver for First RepublicBank Park Cities, N.A.	*	

MEMORANDUM OPINION AND ORDER

Before the Court are:

(1) Defendant NCNB's Motion for Summary Judgment, filed July 18, 1991;

(2) Plaintiffs' Response to Defendant's Motion for Summary Judgment, filed August 6, 1991;

(3) Defendant's Reply, filed August 19, 1991;

(4) Intervenor FDIC's Motion for

Summary Judgment, filed July 18, 1991;

(5) Plaintiff's Response to Intervenor's Motion for Summary Judgment, filed August 6, 1991; and

(6) Intervenor's Reply, filed August 19, 1991.

Facts

The Plaintiffs began this suit in Texas state court in Order to restrain NCNB from foreclosing on five properties that serve as security for five Real Estate Lien - Notes (the "Notes").

At the time the plaintiffs filed suit, all five notes were at least ten months past due. They are currently at least 23 months past due. Plaintiffs admit they executed the notes, but allege that Defendant and its predecessors engaged in various wrongful acts and omissions that obviate Plaintiffs' liability on the notes. No restraining order was ever entered by the state court, but there has been no foreclosure sale on any of the

property in question. The FDIC intervened in this suit on January 15, 1991, at which time the suit was removed to this Court.

All five notes were executed and delivered to Interfirst Bank Park Cities. Subsequently, that bank was succeeded by First RepublicBank Park Cities, which was later succeeded by First RepublicBank Dallas. In Summer 1988, First RepublicBank Dallas was declared insolvent and the FDIC appointed as Receiver. The FDIC, in its corporate capacity, later established a bridge bank, JRB Bank, which was later renamed NCNB-Texas National bank ("NCNB"). Pursuant to a Purchase & Assumption Agreement dated July 29, 1988, the FDIC transferred selected assets and liabilities from the failed bank to NCNB. Among the assets were the five notes that are the subject of this suit.

Plaintiffs executed the first three notes ("Notes A, B and C") and

accompanying deeds of trust on April 30, 1984. Plaintiffs executed the fourth note ("Note D") and an accompanying deed of trust on July 12, 1984. Finally, Plaintiffs executed the fifth note ("Note E") and an accompanying deed of trust on March 12, 1986. The purpose of the loans was to purchase residential rental property for investment purposes.

Summary Judgment

Summary judgment is proper when the pleadings and evidence on file show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment or partial judgment as a matter of law. See, Fed. R. Civ. P. 56. As the Fifth Circuit stated in Christophersen v. Allied-Signal Corp., 902 F.2d 362, 364 (5th Cir. 1990), "[b]efore a court may grant summary judgment, the moving party must demonstrate that it is entitled to judgment as a matter of law

because there is no actual dispute as to an essential element of the plaintiff's case." A movant for summary judgment need not support the motion with evidence negating the opponent's case. See, Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). On the other hand, the party opposing the motion prevails if it presents any evidence tending to support the claim and all evidence must be viewed in the light most favorable to the motion's opponent. See, Gremillion v. Gulf Coast catering Co., 904 F.2d 290, 292 (5th Cir. 1990). Summary judgment may be entered against a party if after adequate time for discovery the party fails to establish the existence of an element essential to his or her case and as to which he or she will bear the burden of proof at trial. See, Celotex, 477 U.S. at 324-26.

Defendant's Motion for Summary Judgment

Defendant NCNB seeks summary judgment on its note counterclaims. Additionally, it seeks summary judgment on Plaintiffs' claims and defenses. Determination of Defendant's Summary Judgment Motion has been complicated by the fact trial Plaintiffs' Response violates Rule 5.2(a) of the Local Rules of the United States District Court for the Northern District of Texas. Plaintiffs' counsel failed to list in numerical order both the disputed facts upon which the Response relies and the issues of law. As a result, the Court has had an exceedingly difficult time deciphering the legal bases of Plaintiffs' response and determining whether genuine issues of material fact exist. Nevertheless, the Court has determined that no such issues exist and that Defendant's motion for summary judgment should be granted.

A. Defendant's Note Claims

To recover on a note, a party must prove that: (1) the note was executed; (2) the note is in default; (3) the party is the legal owner or holder of the note; and (4) a certain sum is due and owing under the note. B.L. Nelson and Assoc., Inc. v. Sunbelt Savings, FSB, 733 F. Supp. 1106, 1109-10 (N.D. Tex. 1990); Clark v.Dedina, 658 S.W.2d 293, 295 (Tex. App. -- Houston [1st Dist.] 1983 writ dism'd).

The moving papers and affidavits submitted in support of NCNB's summary judgment motion, as well as the stipulated facts in the Joint Pretrial Order, file November 5, 1991, established each of these elements. NCNB has introduced copies of the Notes executed by Plaintiffs. Further, the affidavits of Curtis L. Ambrose, an Assistant Vice President of NCNB, and Donna Krauss, an officer of NCNB Services Corporation,

establish that NCNB is the holder of the notes, the notes are in default, and certain sums are due and owing. Thus, NCNB has carried its burden of identifying the materials it contends demonstrate the absence of a genuine issue of material fact. See, Celotex Corp. v. Catrett, 477 U,S. 317, 323 (1986). The burden now shifts to Plaintiffs to show that NCNB should not be granted summary judgment. B.L. Nelson, 733 F. Supp. at 1110.

B. Plaintiffs' Claims and Defenses

Plaintiffs have asserted a number of claims and defenses that they contend defeat Defendant's note claims. Those claims and defenses include an action for an accounting, negligent misrepresentation, usury, and violation of the Texas Deceptive Trade Practices Act. Defendant, on the other hand, argues that the D'Oench Duhme doctrine bars Plaintiffs' claims and defenses. Plaintiffs present a variety of

arguments on why their claims are not barred by D'Oench Duhme.

Under the D'Oench Duhme doctrine, borrowers cannot base their claims or defenses against FDIC or its transferee on the actions or oral representations of a failed bank not reflected in the records. Beighley v. Federal Deposit Ins. Corp., 868 F.2d 776, 784 (5th Cir. 1969). Plaintiffs do not deny that any alleged pre-closing oral agreements, promises or representations of Interfirst Bank Park Cities or First RepublicBank would ordinarily be barred by D'Oench Duhme & Company v. Federal Deposit Ins. Corp., 315 U.S. 477 (1942) and its progeny as further codified in 12 U.S.C. §§ 1823(e), 1821(d,(9)(a). Instead, Plaintiffs present two theories as to why the D'Oench Duhme doctrine does not apply under these facts.

First, Plaintiff's[sic] argue that

the O'Dench Duhme doctrine does not protect the FDIC or its assignees from defects or defenses that are found on the very face of the instrument. Plaintiffs purport to identify two such "defects."

The first such "defect" relates to Notes A, B, and C. Plaintiffs claim those notes were illegal at their inception. On this issue, Plaintiffs contend that the Notes are governed by the guidelines of the Texas Revised Civil Statutes, Article 5069-4.01 et seq. ("Chapter 4"), which is part of the Consumer Credit Code. Article 5069-4.04(2) of chapter 4 prohibits a lender from taking a lien on real property as security for any loan made under Chapter 4. The loans made in connection with Notes A, B, and C, however, are not governed by chapter 4. Article 5069-1.04(n)(1) provides that loans extended primarily for business, commercial, investment, or agricultural

purposes are not, governed by Chapter 4. The loans at issue here were made for investment purposes. Thus, Article 5069-4.04(2) is irrelevant to Notes A, B, and C.

The second "defect" that the Plaintiffs contend exist on the face of the Notes is that they are usurious. Plaintiffs contend that Notes A, B, and C are usurious because those Notes do not specify an interest rate and Defendant charged a rate greater than the statutory rate. Article 5069-1.03 of the Texas Revised Civil Statutes provides that when there is no specified rate of interest agreed upon by the parties, the statutory rate of six percent is read into the agreement. Tex. Rev. Civ. Stat. Ann. art 506901.03 (West 1987). Plaintiffs claim that because Defendant charged fourteen percent, instead of the statutory six percent, the loans were usurious.

Plaintiffs contention is groundless. First of all, although there is no interest rate stated on the note, the Plaintiffs do not contend that there was no agreement for a fourteen percent annual interest rate. That there is no rate stated on the Note faces does not mean that there is no agreed upon or specified rate of interest. In Texas, in determining usury, the contract is construed as a whole, and all papers connected with the transaction are considered. Imperial Corp. v. Frenchmen's Creek Corp., 453 F.2d 1338 (5th Cir. 1972). The Disclosure Statements generated by the bank provide for an annual interest rate of fourteen percent. See, Deposition of Linda Casey. Mrs. Casey, furthermore, admits that she thought the interest rate was fourteen percent. The evidence clearly demonstrates that an agreement existed

between the parties regarding the proper rate of interest. In any event, the agreed upon interest rate, fourteen percent, is not usurious under Texas law. See, Tex. Rev. Civ. Stat. Ann. art. 5069-1.04 (West 1987).

Plaintiffs claim that Notes D and E are also usurious. Notes D and E provided for a variable interest rate based on the commercial base rate or prime rate of InterFirst Bank Dallas, which is no longer in existence. Plaintiffs claim the Notes, therefore, have no computable interest rate; because the Notes have no computable interest rate, the logic goes, Article 5069-1.03 of the Texas Revised Civil Statutes applies and the maximum allowable interest rate is six percent. Plaintiffs contend that because Defendant began basing the interest rate on NCNB's base rate after Interfirst Bank failed, NCNB committed usury. Plaintiff's argument is

wholly without merit. The Plaintiffs do not allege that they ever questioned the interest rates after Interfirst Bank failed and the rates were tied to the NCNB base rate. As noted above Article 5069-1.03 applies only when no agreement on interest exists between the parties. Here there is ample evidence that an agreement did exist, and continued to exist after NCNB took control over the bank. Thus, Article 5069-1.03 is inapplicable.

Plaintiffs' second theory as to why their claims are not barred by the D'Oench Duhme doctrine is that their claims against defendant NCNB arise from the actions and conduct of NCNB itself, not from actions of the prior lending institutions whose assets are now under FDIC control. Plaintiffs identify only one act that can legitimately be identified with Defendant NCNB. When NCNB

took control over the bank, Notes A, B, and C had been carried on First RepublicBank Dallas' retail loan system, accruing interest on the basis of a fourteen percent precomputed interest computation formula, NCNB later placed the Notes on non-accrual and converted them from NCNB's retial loan system to its commercial loan system. Although Plaintiffs have been successful in linking the change in the status of the loans to Defendant NCNB, Plaintiff's have wholly failed to show that they suffered tangible harm from the change in status or that their obligation under the loans increased as a result of such action. In fact the record indicates that placing the loans on a non-accrual basis had no meaningful effect on the relationship between the Plaintiffs and Defendants, and that the change, in status had been effected merely for the accounting convenience of the

bank. The alleged Actions, thus, are not material facts within the preview of Federal Rule of Civil Procedure 56(c). Therefore, the alleged actions cannot serve as a basis for not allowing Defendant NCNB the protection of the D'Oench Duhme, doctrine.

Accordingly, Plaintiffs claims and defenses are barred because they are based on the actions and oral representations of InterFirst Bank Park Cities and First RepublicBank. See, D'Oench Duhme, 315 U.S. 477 (1942); 12 U.S.C. §§ 1823(e), 1821(d)(9)(a).

FDIC/Receiver's Motion for Summary Judgment

Finally, although the FDIC/Receiver is a voluntary intervenor in this lawsuit and Plaintiffs have not formally filed claims against it, it has filed a motion for summary judgment on the ground that the substance or Plaintiffs' allegations

constitute claims against the FDIC/Receiver. Because liability for acts committed by Interfirst and First RepublicBank before July 29, 1988 remained with the FDIC/Receiver pursuant to the terms of the Purchase and Assumption Agreement between it and NCNB, the FDIC/Receiver is entitled to a determination of its liability.

FDIC's motion for summary judgment covers virtually the same ground as Defendant NCNB's motion. FDIC argues that Plaintiffs' claims relate to alleged pre-closing activities or agreements of Interfirst and First RepublicBank and, thus, are barred by the D'Oench Duhme and its progeny. Plaintiffs' response to FDIC's motion is identical to its response to Defendant NCNB's motion. As a result, the Court reaches the same conclusion as to both motions; Plaintiffs' claims and defenses, which are designed to escape

liability for the Notes, are barred by D'Oench Duhme and its progeny. See, D'Oench Duhme, 315 U.S. 477 (1942).

Conclusion

For the foregoing reasons, Defendant and Intervenor's Motions for Summary Judgment are **GRANTED**. Defendants and Intervenors shall promptly submit a proposed judgment, not later than noon, November 22, 1991.

SO ORDERED.

DATED: November 12, 1991.

By: /s/ BAREFOOT SANDERS, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

APPENDIX F

FEDERAL RULES

Federal Rules of Appellate Procedure

Rule 10. The Record on Appeal

(e) Correction or Modification of the Record. If any difference arises as to whether the record truly discloses what occurred in the district court, the differences shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other

questions as to the form and content of the record shall be presented to the court of appeals.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986; Apr. 30, 1991, eff. Dec. 1, 1991.)

Federal Rules of Civil Procedure

Rule 43. Taking of Testimony

(e) Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that matter be heard wholly or partly on oral testimony or deposition.

(As amended Feb.28, 1966, eff. July 1, 1966; Nov. 20, 1972, eff. July 1, 1975; Dec. 18, 1972, eff. July 1, 1975; Mar. 2, 1987, eff. Aug. 1, 1987)

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary

judgment in the party's favor upon all or any part thereof.

(b) For defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary

judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying he facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are

just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials

of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the

affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987)

Rule 60. Relief From Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of

an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged,

or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., §1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita

querela, and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed by these rules or by an independent action.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 2, 1987, eff. Aug. 1, 1987.)

APPENDIX G

STATUTES

12 U.S.C. §1823(e)

(e) Agreements against interests of Corporation

No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement-

(1) is in writing,

(2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obliger, contemporaneously with the acquisition of the asset by the depository institution.

(3) was approved by the board of

directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(4) has been, continuously, from the time of its execution, an official record of the depository institution.

Texas Property Code, §51.003

§51.003. Deficiency Judgment

(a) If the price at which real property is sold at a foreclosure sale under Section 51.002 is less than the unpaid balance of the indebtedness secured by the real property, resulting in a deficiency, any action brought to recover the deficiency must be brought within two years of the foreclosure sale and is governed by this section.

(b) Any person against whom such a recovery is sought by motion may request that the court in which the action is

pending determine the fair market value of the real property as of the date of the foreclosure sale. The fair market value shall be determined by the finder of fact after the introduction by the parties of competent evidence of the value. Competent evidence of value may include, but is not limited to, the following: (1) expert opinion testimony; (2) comparable sales; (3) anticipated marketing time and holding costs; (4) cost of sale; and (5) the necessity and amount of any discount to be applied to the future sales price or the cashflow generated by the property to arrive at a current fair market value.

(c) If the court determines that the fair market value is greater than the sales price of the real property at the foreclosure sale, the persons against whom recovery of the deficiency is sought are entitled to an offset against the deficiency in the amount by which the fair

market value, less the amount of any claim, indebtedness, or obligation of any kind that is secured by a lien or encumbrance on the real property that was not extinguished by the foreclosure, exceeds the sale price. If no party requests the determination of fair market value or if such a request is made and no competent evidence of fair market value is introduced, the sale price at the foreclosure sale shall be used to compute the deficiency.

(d) Any money received by a lender from a private mortgage guaranty insurer shall be credited to the account of the borrower prior to the lender bringing an action at law for any deficiency owed by the borrower. Notwithstanding the foregoing, the credit required by this subsection shall not apply to the exercise by a private mortgage guaranty insurer of its subrogation rights against a borrower

or other person liable for any deficiency.

Added by Acts 1991, 72nd Leg., ch. 12, §1, eff. April 1, 1991.